

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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BOBBY J. CLARK, JR.,
Plaintiff,

v.

TRANS UNION LLC; EXPERIAN
INFORMATION SOLUTIONS, INC.;
EQUIFAX INFORMATION SERVICES,
LLC; ONEMAIN FINANCIAL GROUP,
LLC; and ALLY FINANCIAL INC.;

Defendants.

No. 2:24-cv-783 WBS CKD

MEMORANDUM AND ORDER RE:
ALLY'S MOTION TO COMPEL
ARBITRATION

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Plaintiff Bobby J. Clark, Jr. ("plaintiff") brought this action against multiple entities, alleging violations of credit reporting statutes. (Docket No. 1.) One of those entities is defendant Ally Financial, Inc. ("Ally"), which moves to compel arbitration and stay the matter as to itself pending arbitration. (Docket No. 85.)¹

¹ The court previously granted a motion to compel arbitration by co-defendant Experian Information Solutions, LLC,

1 I. Background

2 Ally "is a bank holding company with its headquarters
3 in Detroit, Michigan." (Docket No. 1 at ¶ 24.) Ally is
4 incorporated in Delaware. (Docket No. 92-3.) On October 21,
5 2021, Ally acquired Fair Square Financial Holdings LLC and its
6 subsidiaries, including Ollo Card Services ("Ollo"). (Docket
7 No. 85-1 at ¶¶ 2, 6.) The acquisition closed on December 1,
8 2021. (Id.)

9 On April 24, 2022, plaintiff applied for an Ollo
10 Rewards credit card, which Ollo approved that same day. (Id. at
11 ¶ 7.) Shortly thereafter, the Bank of Missouri issued plaintiff
12 the card with a cardmember agreement ("Ollo Agreement")
13 containing its terms of service. (Id.) Plaintiff used the card
14 between June and August 2022. (Id. Ex. B at 13, 17.) On August
15 25, 2022, plaintiff signed up for a debt consolidation program to
16 consolidate his debt, and in that process the card was paid off.
17 (Docket No. 92-2 at ¶¶ 5-8.)

18 Sometime between September 23, 2022, and September 28,
19 2022, Ally notified plaintiff that it had acquired Ollo and his
20 credit card account. (Docket No. 85-1 at ¶ 12.) In that time,
21 Ally also issued an amended cardholder agreement ("Ally
22 Agreement") to reflect its acquisition of Ollo. (Id.) Aside
23 from the nominal change in counterparties, the only other
24 apparent difference between the two agreements which has any
25 relevance to this motion is that the Ollo Agreement's choice of
26

27 and staying the claims against it. (Docket No. 59.)
28

1 law provision names Missouri while the Ally Agreement designates
2 Utah as its choice of law.² (Docket No. 85-1 at ¶¶ 10, 15.)

3 Plaintiff asserts a single claim against Ally under
4 15 U.S.C. § 1681s-2(b). (Docket No. 1 at ¶¶ 224-229.) The crux
5 of this claim is that Ally incorrectly reported the account for
6 plaintiff's Ollo Rewards credit card as past due despite
7 plaintiff paying it off through debt consolidation. (Id.
8 at ¶¶ 60-65, 110-20, 152-55, 192, 224-29.)

9 II. Legal Standards

10 The Federal Arbitration Act ("FAA") provides that an
11 arbitration agreement "shall be valid, irrevocable, and
12 enforceable, save upon such grounds as exist at law or in equity
13 for the revocation of any contract." 9 U.S.C. § 2. The FAA
14 "mandates that district courts shall direct the parties to
15 proceed to arbitration on issues as to which an arbitration
16 agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd,
17 470 U.S. 213, 218 (1985).

18 "The FAA limits courts' involvement to 'determining
19 (1) whether a valid agreement to arbitrate exists and, if it
20 does, (2) whether the agreement encompasses the dispute at
21 issue.'" Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1119 (9th
22 Cir. 2008) (quoting Chiron Corp. v. Ortho Diagnostic Sys., Inc.,
23 207 F.3d 1126, 1130-31 (9th Cir. 2000)) (capitalization altered).
24 In doing so, the court must "rely on the summary judgment

25
26 ² Where the cardmember agreements, including their
27 arbitration provisions, are substantially similar, the court only
28 quotes the Ollo Agreement's language. Also, the court uses the
phrases "arbitration provision" and "arbitration agreement"
interchangeably.

1 standard" to resolve genuine disputes of material fact. Knapke
2 v. PeopleConnect, Inc., 38 F.4th 824, 831 (9th Cir. 2022).

3 The Ollo Agreement states that "all disputes against us
4 and/or related third parties shall be resolved by binding
5 arbitration only. . . . If either you or we elect to pursue any
6 claim by either you or us against the other, then the claim shall
7 be resolved exclusively by arbitration." (Docket No. 85-1 Ex. A
8 at 11 (capitalization altered).) It defines "claim" as "any
9 claim, dispute or controversy arising from or relating in any way
10 to this Agreement or your account, or their establishment, or any
11 transaction or activity on your account." (Id.) Ally seeks to
12 enforce this arbitration agreement in the instant motion.

13 III. Discussion

14 A. Illusoriness

15 "The essential elements of any contract, including one
16 for arbitration, are offer, acceptance, and bargained for
17 consideration." Baker v. Bristol Care, Inc., 450 S.W.3d 770, 774
18 (Mo. 2014) (capitalization altered). Plaintiff argues that the
19 Ollo Agreement is void because of Ally's unilateral right to
20 amend the terms of the agreement, which he claims makes the
21 agreement illusory. Under Missouri law, a contract where a party
22 retains "the unqualified right" to unilaterally amend its terms
23 may lack consideration and become "illusory." Johnson v. Menard,
24 632 S.W.3d 791, 797-98 (Mo. Ct. App. 2021).

25 The policy rationale for this principle in Missouri
26 contract law is the possibility that the party with "the
27 unqualified right to unilaterally modify" the contract may
28 retroactively modify the agreement to evade its contractual

1 obligations when those obligations become inconvenient. Id.
2 Missouri law affords an exception to this unilateral modification
3 rule for contract for amendments which "are prospective in
4 application" and give the counterparty "reasonable advance
5 notice." Patrick v. Altria Grp. Distrib. Co., 570 S.W.3d 138,
6 144 (Mo. Ct. App. 2019).

7 The Ollo Agreement states that Ollo or Ally "can amend
8 the terms of this Agreement by changing terms, adding new terms,
9 or deleting terms from this Agreement at any time. We will give
10 you notice of an amendment as required by applicable law."

11 (Docket No. 85-1 Ex. A at 10.) It continues that "any amendment
12 of this agreement will become effective at the time stated in our
13 notice. Unless we state otherwise, the amended terms will apply
14 to all outstanding balances on your account as well as to new
15 transactions to the extent permitted by applicable law." (Id.)
16 The Ollo Agreement's amendment section is silent on whether it
17 applies to the arbitration provision.

18 Notwithstanding plaintiff's argument that the Ollo
19 Agreement is illusory, he does not claim that Ally exercised the
20 unilateral modification provision in any way that was prejudicial
21 to him and has not persuaded the court that the Ollo Agreement is
22 void ab initio because of this provision. See Donelson v.
23 Ameriprise Fin. Servs., Inc., 999 F.3d 1080, 1089-91 (8th Cir.
24 2021), where the Eighth Circuit applied Missouri law and enforced
25 the defendant brokerage's arbitration agreement over the
26 plaintiff investor's argument that it was illusory due to the
27 brokerage retaining the unilateral right to modify it. The
28 Eighth Circuit reasoned that the brokerage providing and

1 servicing the plaintiff's investment account constituted
2 consideration for the underlying agreement. Id. at 1090-91. Its
3 analysis in Donelson applies equally here to the Ollo agreement.
4 See id. at 1089-91.

5 Therefore, the court rejects plaintiff's argument that
6 the arbitration provision is illusory under Missouri state law.

7 B. Unconscionability

8 Plaintiff next argues that the Ollo Agreement Ally
9 seeks to enforce is unconscionable due to its arbitration
10 provision and unilateral modification provision.

11 "Unconscionability is defined as an inequality so strong, gross,
12 and manifest that it must be impossible to state it to one with
13 common sense without producing an exclamation at the inequality
14 of it. The unconscionability doctrine 'guards against one-sided
15 contracts, oppression, and unfair surprise.'" Id. at 1091
16 (citation omitted) (quoting Eaton v. CMH Homes, Inc., 461 S.W.3d
17 426, 432 (Mo. 2015)).

18 In Donelson, 999 F.3d at 1089-91, the Eight Circuit
19 rejected plaintiff's unconscionability challenge where the
20 agreement at issue was arguably more unconscionable than the Ollo
21 Agreement because it made the investor arbitrate claims against
22 the brokerage but not vice-versa. See id. at 1090-91. At
23 minimum, the arbitration provision in the Ollo Agreement requires
24 either party to arbitrate claims against the other. (See Docket
25 No. 85-1 Ex. A at 11.)

26 While the Ninth Circuit does not appear to have applied
27 Missouri law in similar circumstances, it has rejected
28 unconscionability challenges in instances where a plaintiff

1 consumer has challenged the defendant's arbitration agreement
2 under the laws of different states. See, e.g., Patrick v.
3 Running Warehouse, LLC, 93 F.4th 468, 479-80 (9th Cir. 2024);
4 Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1032-33 (9th Cir.
5 2016).

6 For example, the Ninth Circuit recently held in a
7 dispute between retailers of sporting goods and customers that
8 "the presence of a unilateral modification provision, without
9 more, does not render a separate arbitration clause at all
10 substantively unconscionable" under California law. Running
11 Warehouse, 93 F.4th at 479-80. In doing so, the Ninth Circuit
12 followed its prior reasoning in Tompkins v. 23andMe, Inc., 840
13 F.3d at 1032-33, where it came to the same conclusion regarding
14 the alleged unconscionability of a contract containing both
15 unilateral modification and arbitration provisions. There the
16 Ninth Circuit held that "although we have held that a unilateral
17 modification provision itself may be unconscionable, we have not
18 held that such an unconscionable provision makes the arbitration
19 provision or the contract as a whole unenforceable." Id. at
20 1033. The same reasoning applies to the Ollo Agreement here.

21 Regardless, the parties delegated adjudication of
22 contractual challenges against the Ollo and Ally Agreements
23 themselves such as lack of assent or consideration and
24 unconscionability to the arbitrator. (See Docket No. 85-1 Ex. A
25 at 11.) The Ollo Agreement's arbitration provision states that
26 "claims regarding the applicability of this arbitration provision
27 or the validity of the entire Agreement shall be resolved
28 exclusively by arbitration." (Id. at 11 (capitalization

1 altered).) Such delegation is sufficient to compel arbitration
2 of his claim against Ally. See Running Warehouse, 93 F.4th at
3 479-80 (compelling arbitration because parties agreed to delegate
4 arbitrability to arbitrator).

5 C. Assent

6 Plaintiff next argues that he never assented to the
7 Ally Agreement. (See Docket No. 92-2 at ¶¶ 4-8.) Plaintiff's
8 reasoning is that he has not used the card since August 25, 2022,
9 which predates Ally's acquisition of Ollo. (See id.) As a
10 result, plaintiff never used the card while the Ally Agreement
11 was in effect, so its terms do not apply to him, in his view.

12 But plaintiff's assent to the Ally Agreement is not
13 necessary to compel arbitration of his claim against Ally. The
14 Ollo Agreement makes clear that the exclusive means of accepting
15 it are (1) not cancelling the "account within 30 days after
16 receiving a card," or (2) using the account in any way, such as
17 by making purchases using the card. (Docket No. 85-1 Ex. A at 8
18 (capitalization altered).) This means that plaintiff accepted
19 the Ollo Agreement, including its arbitration provision, by using
20 the card between June and August 2022, and by not closing the
21 account afterwards. (See Docket No. 92-2 at ¶ 8.)

22 In addition, the Ollo Agreement anticipates Ally's
23 acquisition of Ollo by including Ollo's "employees, affiliates,
24 beneficiaries, agents . . . and assigns" as potential enforcers
25 of its arbitration agreement and clarifying that "the
26 purchaser(s) of any balances of your account are express third-
27 party beneficiaries of this arbitration provision and are
28 entitled to enforce it to the same extent as if they were a party

1 to this agreement." (Id. (cleaned up).) As such, plaintiff's
2 acceptance of the Ollo Agreement survives Ally's acquisition of
3 Ollo, and plaintiff's argument that he never assented to the Ally
4 Agreement fails.


5 D. Other Arguments

6 Plaintiff also argues that Ally's alleged non-
7 compliance with formalities set out in federal and Delaware
8 statutes extinguishes its right to compel arbitration; that the
9 Frantz declaration submitted by Ally is inadmissible due to its
10 lack of foundation and her lack of personal knowledge; and that
11 Ally waived any right to compel arbitration by waiting ten months
12 after being served with the complaint to move to compel
13 arbitration. The court finds each of these arguments to be
14 without merit. Plaintiff fails to cite any binding authority why
15 any of the cited statutes preclude arbitration. See, e.g.,
16 15 U.S.C. §§ 7001(c), 7006; 5 Del. Code § 952(a). Franz's
17 declaration reflects her personal knowledge and lays a proper
18 foundation for her testimony. (See Docket No. 59 at 3-6 & n.2.)
19 And Ally did not make "an intentional decision not to move to
20 compel arbitration." See Armstrong v. Michaels Stores, Inc.,
21 59 F.4th 1011, 1014-5 (9th Cir. 2023).

22 IT IS THEREFORE ORDERED that Ally's motion to compel
23 arbitration (Docket No. 85) be, and the same hereby is, GRANTED.
24 IT IS FURTHER ORDERED that the claim against Ally is STAYED
25 pending arbitration. Because all claims in this case have been
26 dismissed or stayed, the Clerk shall close this file
27 administratively, subject to it being reopened upon the
28 application of any party after arbitration has been fully

completed.

Dated: March 3, 2025


WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE